

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

NEVADA SECURITY INNOVATIONS, LTD.

and

Case: 31-CA-26020

FEDERATION OF POLICE, SECURITY,
& CORRECTION OFFICERS - AFSPA

Ann J. White, Esq. Los Angeles, CA,
for the General Counsel.

*Norman H. Kirshman, Esq. (Kirshman Harris
& Rosenthal)*, Las Vegas, NV,
for the Respondent.

Sidney H. Kalban, Esq., New York, NY,
for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Los Angeles, California on October 20, 2003. On November 14, 2002, Federation of Police, Security and Correction Officers - AFSPA (the Union) filed the charge in Case 31-CA-26020 alleging that Nevada Security Innovations, Ltd. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On December 30, 2002, the Acting Regional Director for Region 31 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

On August 1, 2002, the Union was certified as the exclusive collective bargaining representative of Respondent's security officers employed at various federal agencies, locations and facilities. See *Nevada Security Innovations*, 337 NLRB 1108 (2002). The complaint alleges that the Union is the certified collective-bargaining representative of a unit of Respondent's security officers and that Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union on request. Respondent filed a Motion for Summary Judgment with the Board and the General Counsel filed a Cross-Motion for Summary Judgment. Respondent raised in its Motion for Summary, inter alia, a defense that after certification of the Union, the Union transferred its bargaining rights to an affiliated local union, Local 2001. Therefore, Respondent argued that it had no obligation to bargain with the Union. The General Counsel alleged that the Union remained the

exclusive collective-bargaining representative at all times since certification. The Union specifically denied that a transfer of bargaining rights occurred.

5 On May 29, 2003, the Board issued an unpublished order denying both motions for summary judgment. The Board found “that neither the Respondent nor the General Counsel has shown that there is no genuine issue of material fact as to whether the Union transferred its bargaining rights.” The Board stated “for this reason alone, we deny the General Counsel’s Cross-Motion for Summary Judgment.” For that reason, and for other reasons, not relevant to this
10 decision ¹, the Board denied the Respondent’s Motion for Summary Judgment.

Thus, the issue in the instant case is whether the Union transferred its bargaining rights to Local 2001, thereby privileging Respondent’s refusal to bargain with the Union.

15 The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,² and having considered the post-hearing briefs of the parties, I make the following:

20 Findings of Fact and Conclusions

I. Jurisdiction

25 Respondent is a Nevada corporation engaged in the business of providing security services to various federal agencies in California and Nevada. In the 12 months prior to the issuance of the complaint, Respondent received revenue in excess of \$50,000 from the federal government. The Board found, during the summary judgment procedure, that Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

30 Respondent admits and the Board found that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

35 As stated earlier, on August 1, 2002, the Board issued a decision and certification of representative certifying the Union as the exclusive collective bargaining representative of Respondent’s security officers in Los Angeles and Orange Counties, California, and overruling Respondent’s objections to the Board conducted representation proceeding. At footnote 2 of the Board’s decision, 337 NLRB 1108, the Board stated:

40 The Employer also contends that [the Union] should not be certified because it intends to transfer its bargaining rights to [Local 2001]. The hearing officer rejected this contention on the ground that it raises a ‘post-election matter.’ We agree. If any post-certification

45 ¹ The Board overruled defenses that Respondent raised in this proceeding, which had been, previously dismissed in the representation proceeding.

² The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

changes in bargaining representative were to occur, they may be addressed in appropriate subsequent proceedings. See, e.g., *Goad Co.*, 333 NLRB 677 (2001) (employer did not violate Sec. 8(a)(5) when it refused to bargain after the statutory bargaining representative transferred its representational responsibilities to another labor organization). Here, it is not clear that [the Union] intended, upon certification, to transfer its bargaining rights . . . If, after certification, [the Union] seeks to transfer bargaining rights, the Board can deal with that in an appropriate case.

As stated earlier, upon cross motions for summary judgment, on May 29, 2003, the Board ordered a hearing on the issue of whether the Union transferred its bargaining rights to Local 2001, after certification.

On August 15, 2002, the Union's secretary-treasurer wrote Respondent requesting that Respondent contact the Union to begin collective bargaining. On August 30, Respondent through its attorney replied that the Board was in error in certifying the Union as bargaining agent and that Respondent would not bargain with the Union "unless the certification is determined to be enforceable." On October 1, 2002, the Union again requested that Respondent commence collective bargaining. On October 29, Respondent's attorney denied the request to bargain, challenging the Board's certification.

On November 12, 2002, the Union entered into an agreement with its Local 2001 in San Pedro, California providing that Local 2001:³

1. Hold meetings with the membership [the bargaining unit of Respondent's employees].
2. Make up mailings to the membership.
3. Work with the leadership of Nevada Security Innovations.
4. Keep up to date records of all complaints, unfair labor practices and other items that need to be handled.
5. Keep the [Union] informed of [Local 2001's] activities.

The last line of the agreement between the Union and its Local 2001 stated "As the certified bargaining representative, the National will, of course, be in charge of negotiations once the Company agrees to sit down and bargain." On November 14, the Union filed the instant unfair labor practice charge alleging a refusal to bargain by Respondent.

On December 5, 2002, Randy Brown, president of Local 2001, wrote Respondent stating,

On November 13, 2002, [the Union] informed me that [the certified bargaining unit employees] were now part of our local, Local 2001. It is as their representative that I am now contacting you.

³ The Union's small staff is located on the East Coast. The alleged purpose of the November 12 agreement was to minimize travel expenses for the Union. Local 2001, on the other hand, expected to obtain new members for Local 2001 as a result of its efforts.

On December 1, 2002, the Local held its first united local meeting to discuss the direction the Local would take in beginning the collective bargaining process. With that in mind, we are requesting to meet with you to discuss issues of importance to the officers, relative to their pay and benefits as well as working conditions, at the earliest possible opportunity.

As a result of your previous refusal to recognize the vote and wishes of the employees, we feel that it is imperative to advise you that should you not respond to this notification to commence negotiations in good faith prior to December 31, 2002, the Local will have no choice to consider initiation of job action.

Respondent did not answer Brown's request for bargaining. On December 13, 2002, Brown wrote the bargaining unit employees a letter entitled "welcome aboard" in which he stated that the Union "was giving Local 2001 the opportunity to expand our service to our fellow Union Brothers and Sisters." Brown then welcomed the employees into Local 2001. Brown further stated, "to commence our efforts to represent you, we have scheduled a meeting of the general membership to familiarize you with the negotiation process." On January 8, 2003, Brown informed the members of Local 2001 that job action against Respondent was imminent. When Respondent did not respond to Brown's December 5 request to bargain, Brown organized some job actions at the Los Angeles International Airport.

On January 10, 2003, Brown wrote the Federal General Services Administration a letter in which he urged GSA not to renew its contract with Respondent "until such time as good faith negotiations have taken place and a collective bargaining agreement is in place."

While Brown is president of Local 2001, he holds no position with the Union. Brown testified that before sending the December 5, 2002 letter requesting bargaining to Respondent, he sent a draft of the letter to the Union's then business manager.⁴ Brown received permission to send the letter. Brown further testified that the shop steward for Respondent's employees had informed him that the unit employees had voted to become members of Local 2001. Howard Johannssen, president of the Union, testified that the unit employees could choose to be a separate local of the Union, members of an existing local of the Union, or members-at-large of the Union. According to Johannssen, the Union had not yet conducted such a vote among the unit employees. While Brown testified that the bargaining unit employees were members of Local 2001, Johannssen testified that the unit employees were members of the Union. In the absence of a collective-bargaining agreement, the bargaining unit employees were not paying dues to either the Union or Local 2001.

I draw the inference that Brown and the business manager, expected that the bargaining unit employees would become members of Local 2001 and that the Union and Local 2001 would share union dues pursuant to the Union's procedures. However, this procedure would take place *after* a collective-bargaining agreement was in place. Under the Union's normal procedures after the contract is reached, the employees can choose to be their own local, affiliated with an existing local or members at large of the National Union.

On February 18, 2003, while the cross-motions for summary judgment were pending, the Union's secretary-treasurer, filed a declaration which stated, "so there can be no confusion . . .

⁴ The Union's business manager died prior to the instant hearing. While the Union argues that there is no evidence to corroborate Brown's testimony that he received permission to send the December 5 letter, I credit Brown's testimony.

FOSCO, the National Union, is the certified bargaining representative for the unit employees and has never delegated authority elsewhere nor authorized any person or other entity to fulfill that role.”

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Analysis and Conclusions

Respondent argues that subsequent to the certification, Respondent transferred its representational rights to Local 2001. It is well settled that it is the duty of an employer to bargain solely with a statutory representative and no other person or group. However, a bargaining representative “may . . . confer upon an agent . . . authority to act on its behalf.” *Goad Company*, 333 NLRB 667 (2001); *Rath Packing Co.*, 275 NLRB 255, 256 (1985). Employers and unions have the right “to choose whomever they wish to represent them in formal labor negotiations.” *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). Although a certified representative may delegate its duties under a contract, it cannot delegate its responsibilities. *Goad Co.*, *Ibid*; *Mine Workers Local 17*, 315 NLRB 1052, 1064 (1994); see also *Reading Anthracite Co.*, 326 NLRB 1370 (1998).

In *Goad*, the respondent-employer’s employees, for a number of years, were represented by various locals of the Plumbers Union. Eventually, Local 420 became the Plumbers Union’s local representing the respondent-employer’s employees. The president of the Plumbers Union wrote the respondent-employer advising him that the Plumbers Union was transferring jurisdiction over the bargaining unit employees to a different local, Local 562. The respondent-employer subsequently refused to bargain with Local 562. An unfair labor practice charge was filed against the respondent-employer and the regional director dismissed the charge. That dismissal was upheld on appeal. Thereafter, in an effort to circumvent that determination, Local 420 and Local 562 entered into an agreement in which Local 420 attempted to designate Local 562 as the agent of Local 420 for “negotiating and servicing” the contract with the respondent-employer including “other actions comprising the duty of representation.” In addition, the two locals executed a waiver absolving Local 420 for all liability for Local 562’s actions.

The Board held that Local 429 did not simply enlist the aid of an agent; rather it transferred its representational responsibilities to Local 562, which was not the certified representative of the employees. The Board found that the respondent-employer had no obligation to bargain with Local 562 and dismissed the complaint.

Prior to *Goad*, the Board, in *Sherwood Ford, Inc.*, 188 NLRB 131 (1971), found no obligation to bargain where a local union sought to substitute another local union as bargaining agent. *Sherwood Ford* involved a local union, Local 1, whose leadership was inexperienced in bargaining on behalf of automobile salesmen. That local sought to affiliate with Local 604, an automobile salesmen’s local. Refusal to bargain charges filed by Local 604 were dismissed when the investigation disclosed that the affiliation vote among members of Local 1 was defective due to a lack of notice. Thereafter, on August 21, 1968, the members of Local 1 ratified a resolution which designated Local 604 as the “duly constituted representative” of Local 1 “to appear on behalf of and represent” Local 1 in bargaining with *Sherwood Ford, Inc.* *Id.* at 132. *Sherwood Ford* refused to bargain with representatives of Local 604. The Board found no violation and adopted the decision of the trial examiner whose discussion of the issue presented stated:

As Respondent could not lawfully have recognized Local 604 as the bargaining representative of the employees, we turn to the question whether it was required to recognize that Local as the bargaining representative of Local 1. Setting aside for the

moment the legalisms in which the resolution [in which Local 1 appoints Local 604] is couched, the record otherwise fully supports Respondent's contention that the August 21 maneuver was a patent attempt to substitute Local 604 as the bargaining agent in place of Local 1 and that it was a device, subterfuge, or stratagem by which the two locals sought to circumvent the earlier rulings of the Regional Director [who had held there was no obligation to bargain with Local 604].

. . .

Though the General Counsel cites authority for the familiar principle that a statutory bargaining representative may select outside experts and other advisors as personnel of its bargaining team, [footnoted omitted] the facts in the present case leave that principle without application, for here the parties were attempting an outright substitution of representatives, not just the association of expert aides. [Id. at 133, 134.]

In the instant case, the Union never notified Respondent that it had transferred its jurisdiction or representational responsibilities to Local 2001. The Union never notified Respondent that Brown or Local 2001 were its agents. Here, after Respondent's attorney notified the Union that Respondent would test the Board's certification, the Union entered into an agreement with its Local 2001 providing that Local 2001; hold meetings, make up mailings, work with the employee leadership of Respondent, keep records and inform the Union of its activities. The agreement clearly stated, "As the certified bargaining representative, the National will, of course, be in charge of negotiations once the Company agrees to sit down and bargain."

Respondent had refused to bargain, citing disagreement with the certification, prior to any demand to bargain by Brown.

General Counsel and the Union argue that Brown did not have authority to request bargaining with Respondent. Section 2(13) of the Act, states: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In determining whether an individual is an agent of the employer, the Board applies the common law principles of agency as set forth in the Restatement (Second) of Agency *Allegany Aggregates*, 311 NLRB 1165 (1993); *Dentech Corp.*, 294 NLRB 924, 925-926 (1989). Under the doctrine of apparent authority, agency status may be established where the employer's manifestations to a third party supply a reasonable basis for the third party, to believe that the employer has authorized the alleged agent to do the acts in question. *Allegany Aggregates*, supra, at 1165. Thus, either the employer must intend to cause the third person to believe that the alleged agent is authorized to act for him, or the employer should realize that its conduct is likely to create such belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988); Statements of the putative agent do not constitute evidence of agency status. *MPG Transport, LTD*, 315 NLRB 489, 493 (1994), enfd. 91 F.3d 144 (6th Cir. 1996); *Virginia Mfg. Co.*, 310 NLRB 1261, 1266 (1993), enfd. 27 F.3d 565 (4th Cir. 1994). While General Counsel and the Union argue that Brown acted outside his authority, the evidence establishes that Brown sent a draft of his request to bargain to the Union's business manager and received permission to send the request to Respondent. Thus, the record here establishes that Local 2001 (acting through Brown) was authorized by the Union's business manager to be the Union's limited agent *and* to send the request to bargain.

The first issue is whether Brown was requesting bargaining on behalf of Respondent or on behalf of Local 2001. Brown stated that the employees were part of his Local and that he was requesting bargaining on their behalf. He stated that he was requesting bargaining based

upon a meeting of the Local and threatened job action by the Local. He later initiated job action. Based on Brown's actions, Respondent could assume that Brown was seeking to substitute Local 2001 as the bargaining representative. Thus, under *Goad*, and *Sherwood Ford*, supra,
 5 Respondent could refuse to bargain with Local 2001.

In the instant case, as distinguished from *Goad* and *Sherwood Ford*, the General Counsel seeks to compel the Respondent to bargain with the certified bargaining representative and not a purported agent or substituted representative. The fundamental issue is whether
 10 Respondent's failure and refusal to bargain with the Union is excused by Brown's request that Respondent bargain with Local 2001. I conclude that it does not. Respondent was obligated to bargain with the Union. It decided to test the Board's certification and to refuse to bargain, prior to Brown's request to bargain. Thereafter, the Union agreed with Local 2001 that Local 2001
 15 would act as its agent. However, that agency was expressly limited by the Union's retention of control over collective bargaining. Respondent could ignore a request to bargain by Local 2001, or any other labor organization, not the exclusive bargaining representative of the employees. However, the Union remains the exclusive bargaining representative and did not
 20 waive its right to bargain. Therefore, I find Respondent must still bargain collectively with the Union. I further find that Respondent has failed to carry its burden of proving that the Union had transferred its bargaining rights and responsibilities.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting
 25 commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing on and after August 15, 2002, to meet and bargain with the
 30 Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

35 Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist, to meet and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed
 40 agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, the Board shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) ; *Lamar Hotel*, 140 NLRB 226, 229 (1962),
 45 enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: ⁵

ORDER

Respondent, Nevada Security Innovations, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:
 - a. Failing and refusing to meet and bargain with Federation of Police, Security and Correction Officers-AFSPA as the exclusive bargaining representative of the employees in the bargaining unit.
 - b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - a. On request, meet and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full time and regular part time security officers employed at various federal agencies locations and facilities as set forth in Attachment B to the Stipulated Election Agreement.

Excluded: Office clerical employees, professional employees, all other employees, supervisors (including lead security officers) as defined in the Act.
 - b. Within 14 days after service by the Region, post at its Facilities in Los Angeles and Orange Counties, California, copies of the attached notice marked "Appendix." ⁶Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these

⁵ All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2002.

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- c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated: December 22, 2003, San Francisco, California.

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Jay R. Pollack
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Federation of Police Security and Correction Officers-AFPSA as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full time and regular part time security officers employed at various federal agencies locations and facilities as set forth in Attachment B to the Stipulated Election Agreement.
Excluded: Office clerical employees, professional employees, all other employees, supervisors (including lead security officers) as defined in the Act.

Nevada Security Innovations, LTD.

(Employer)

Date _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S - COMPLIANCE OFFICER, (310) 235-7123.